

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 14, 2007

RUSSELL T. ALLEN v. PENNY ANN ALLEN (NOW KOLBE)

Appeal from the Chancery Court for Montgomery County
No. 97-12-0057 Carol Catalano, Chancellor

No. M2005-00074-COA-R3-CV - Filed on July 10, 2007

Mother appeals the denial of her request for modification of custody and contempt, the award of Husband's attorney's fees, and the denial of her request for damages to personal property. Finding no error below, the judgment of the trial court is affirmed in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Andrea R. Goble, Clarksville, Tennessee, for the appellant, Penny Ann (Allen) Kolbe.

B. Lynn Morton, Clarksville, Tennessee, for the appellee, Russell T. Allen.

OPINION

This appeal concerns a request for modification of custody and contempt and other related post-divorce matters. On March 20, 2000, Mr. Russell Allen and Mrs. Penny Kolbe were divorced. The court awarded the parties joint custody of the two minor children with Mr. Allen acting as primary residential parent. The court ordered Mrs. Kolbe to pay child support in the amount of thirty-two percent (32%) of her net wages. The order specifically provided:

6. Child Support. It is agreed that the Wife shall pay to Husband as child support an amount per month which is equivalent to thirty-two percent (32%) of the Wife's net wages. The Wife alleges to be injured and not able to work at this time. It shall be incumbent upon the Wife to produce to the Husband medical documentation from a treating physician that states the Wife is unable to work, the reasons for her inability to work and the duration of time the medical doctor is of the opinion that the Wife will be unable to work. In the event the Wife does not produce said medical documentation, the Wife's obligation to pay child support shall commence on Friday, March 24, 2000 and Wife shall pay to the Husband 32% of her net weekly wage and

if Wife does not produce documentation reflecting her income, the income shall be predicated and based upon the Guidelines assumption.

Shortly after the divorce, on April 25, 2000, Mr. Allen filed a petition for a restraining order against Mrs. Kolbe. Mr. Allen alleged that Mrs. Kolbe had failed to obtain court-ordered counseling, that she was disrupting and manipulating the children, and that she was removing the children from class and telling them bizarre and strange things. The court issued a restraining order based on the petition preventing Mrs. Kolbe from coming to the marital home and suspending her visitation with the children until she obtained proper counseling. Mrs. Kolbe responded with a counter-petition on June 5, 2000, seeking sole custody of the children and contempt. Mrs. Kolbe alleged that Mr. Allen had attempted to alienate the children from her, that Mr. Allen had refused to allow Mrs. Kolbe telephone contact with the children, and that Mr. Allen had excluded her from participating in the children's counseling.

Due to Mrs. Kolbe's failure to provide any medical documentation reflecting her inability to work, Mr. Allen filed a motion on May 17, 2000, requesting that child support be set based upon the statutory presumption of \$95.00 per week. In response, Mrs. Kolbe filed a motion to modify support on August 7, 2002, requesting that the child support be based upon her current income rather than imputed income. Mr. Allen answered and counter-petitioned on September 13, 2002, alleging that Mrs. Kolbe was able bodied and employed, that Mrs. Kolbe had violated the visitation schedule, and that Mrs. Kolbe had made derogatory remarks to the children about him. Mr. Allen requested that Mrs. Kolbe's petition be dismissed and that costs and attorney's fees be assessed against Mrs. Kolbe.

After a four day hearing, the court entered an order on December 17, 2004, making forty-four (44) written findings of fact. Based on those facts, the court (1) found no material change in circumstances which justified reconsideration of the joint custody arrangement; (2) dissolved the restraining order entered against Mrs. Kolbe; (3) found that Mrs. Kolbe owed Mr. Allen \$3,741.14 in unpaid child support; (4) set monthly child support at \$148.00; (5) dismissed Mrs. Kolbe's petition for contempt due to lack of evidence; (6) awarded Mr. Allen his attorney's fees in the amount of \$7,150.00; and (7) denied Mrs. Kolbe's request for damages to personal property due to lack of evidence.

Mrs. Kolbe filed a timely appeal alleging that the trial court erred in (1) finding no material change in circumstances to warrant a modification of custody; (2) dismissing her motion for contempt due to lack of evidence; (3) awarding Mr. Allen \$7,150.00 in attorney's fees; and (4) denying her request for damages to personal property due to lack of evidence. Mr. Allen requests an award of attorney's fees for this appeal.

I. MODIFICATION OF CUSTODY

We review a denied request for modification of custody *de novo* upon the record with a presumption of correctness below. *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn.2001). The appellate court will not disturb a child custody decision unless it is based on a material error of law

or the evidence preponderates against it. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn.Ct.App.1997). Because custody and visitation determinations often hinge on subtle factors, including the parents' demeanor and credibility, we are reluctant to second-guess the trial court's decisions. *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn.Ct.App.1996).

A valid child custody order may only be modified where a material change of circumstances has occurred such that a change of custody is in the best interests of the child. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn.2003). A change of circumstances is one that affects the child's well-being in a meaningful way. *Hoalcraft v. Smithson*, 19 S.W.3d 822, 829 (Tenn.Ct.App.1999). To constitute a material and substantial change of circumstances warranting modification of a custody decree, the change must occur after the entry of the order sought to be modified and the change cannot be one that was known or reasonably anticipated when the order was entered. *Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn.2002). The burden of proving a material and substantial change of circumstances rests upon the party seeking a modification of the prior order. *Hoalcraft*, 19 S.W.3d at 830.

Mrs. Kolbe first argues that preventing the children from having contact with her during the time in which the restraining order was in effect constituted a material and substantial change in circumstances. Mrs. Kolbe relied on the testimony of Dr. James Hebda, a family counselor who met with the children on two occasions. Dr. Hebda testified that the children suffered harm by being deprived of visitation with their mother. Dr. Hebda however did not believe that either child developed a reactive attachment disorder as a result. Dr. Janie Barryman, a licensed psychologist who treated the children from December 1998 until March 2001, also testified. However Dr. Barryman believed that for the most part, things got better for the children during the suspension of Mrs. Kolbe's visitation. She remembered that although the children missed their mother, both their behavior and their grades improved during this time.

In determining that the suspension of Mrs. Kolbe's visitation was not a material change in circumstances, the court clearly afforded more weight to the testimony of Dr. Barryman than to the testimony of Dr. Hebda. Dr. Hebda's testimony revealed that he was unaware of the circumstances leading to the suspension of Mrs. Kolbe's visitation rights. Furthermore, he based his expert opinion on two meetings with the children and an incomplete medical history provided by the children's prior counselors. In contrast, Dr. Barryman was involved in the emotional and mental health of the children from December 1998 to March 2001 and her testimony indicated an intimate familiarity with the family's history and the needs of the children. Since the trier of fact determines the weight and credibility afforded to an expert witness' testimony, *McClain v. McClain*, No. E2002-00913-COA-R3-CV, 2003 WL 1452958, at *7 (Tenn.Ct.App. Mar. 21, 2003), and the record fully supports the trial court's credibility determination, we affirm the trial court's finding that the suspension of Mrs. Kolbe's visitation did not result in a material change in circumstances.

Mrs. Kolbe also argues that the divorce of Mr. Allen from his second wife, Mrs. Connie Allen, constituted a material change in circumstances.¹ The parties' eldest child denied that he ever witnessed his father and Connie arguing. He also testified that he was unaware that Connie planned to move from the marital home. Connie testified that although she and Mr. Allen discussed their separation, they never mentioned her decision to leave the marital home in the presence of the children. Based on the evidence, the court found that the couple's separation had little impact on the children. Having found nothing in the record to support Mrs. Kolbe's assertion that Mr. Allen and his second wife's divorce detrimentally affected the stability of the children's living environment, we affirm the trial court's finding.

Mrs. Kolbe finally asserts that Mr. Allen's interference in her telephone contact with the children constituted a material change in circumstances. Tenn. Code Ann. § 36-6-101(a)(2)(B) provides that a material change in circumstances may include the failure to adhere to the requirements of a parenting plan. According to the visitation provision of parties' marriage dissolution agreement, Mrs. Kolbe retained the right to "unimpeded telephone conversations with the children at least twice a week at reasonable times and for reasonable durations." Mrs. Kolbe testified that although Mr. Allen permitted her to speak with the children twice a week, he limited their conversations to only thirty minutes. We agree with the trial court that limiting the duration of Mrs. Kolbe's telephone contact with the children to thirty minutes twice a week was reasonable. The limitation therefore did not violate the provisions of the marriage dissolution agreement and did not amount to a material change in circumstances.

Since Mrs. Kolbe failed to show a material change in circumstances, we need not engage in a best interests determination. *See Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn.Ct.App.1999). We therefore affirm the trial court's refusal to reconsider the parties' existing joint custody arrangement.

II. CONTEMPT

Mrs. Kolbe also alleged in her counter-petition for sole custody that Mr. Allen engaged in contemptuous behavior since the divorce including (1) making derogatory comments about her to the children; (2) planning to relocate the children to Florida; (3) excluding her from participating in the children's counseling; and (4) interfering with her telephone contact with the children. The trial court dismissed Mrs. Kolbe's petition for contempt based on a lack of evidence.

The evidence adduced at trial showed that there was no proof substantiating that Mr. Allen made derogatory comments to the children about Mrs. Kolbe. In fact, the parties' eldest child denied that Mr. Allen ever spoke negatively about Mrs. Kolbe. Likewise, Mrs. Kolbe introduced no evidence supporting her accusations that Mr. Allen intended to relocate the children to Florida. The proof further showed that Mr. Allen made every effort to include Mrs. Kolbe in selecting the children's counselor, however Mrs. Kolbe refused to find any proposed counselor agreeable. It was only after these efforts that Mr. Allen's attorney advised him to "go ahead with" the children's

¹ Although Mr. Allen and Mrs. Connie Allen were separated at the time of the hearing, in August 2003, the couple did not finalize their divorce until December 2003.

present counselor, Dr. Berberich. Furthermore, we have already determined that the time limitations Mr. Allen placed on Mrs. Kolbe's telephone contact with the children was reasonable. Since we can find no evidence supporting Mrs. Kolbe's petition for contempt, we affirm the trial court's dismissal.

III. ATTORNEY'S FEES

Pursuant to Tenn. Code Ann. § 36-5-103(c), a prevailing party may recover attorney's fees incurred in enforcing a child support or custody decree.

(c) The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

Since the question of whether to award attorney's fees is largely within the discretion of the trial court, the appellate courts will not interfere with such an award absent an abuse of discretion. *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn.1995). However, the fees must be appropriate and equitable under the circumstances. *Deas v. Deas*, 774 S.W.2d 167, 169 (Tenn.1989).

The trial court awarded Mr. Allen \$7,150.00 in attorney's fees "due to the necessity of his action to recover child support that should have been paid by Penny Kolbe since the parties' divorce in March, 2000." Mrs. Kolbe challenges the amount of the award asserting that the fees included services unrelated to Mr. Allen's petition to recover unpaid child support and that Mrs. Kolbe's counsel did not have the opportunity to cross-examine Mr. Allen or his attorney about the computation of the award. The court directed Mr. Allen's attorney to file an affidavit of time and activity, however, no such affidavit is present in the record. "While it is preferable to prove the reasonableness of such fees through the affidavit of the attorney doing the work, the Court can determine a reasonable fee upon consideration of all facts and circumstances presented by the record." *Hennessee v. Wood Group Enters., Inc.*, 816 S.W.2d 35, 37 (Tenn.Ct.App.1991). Since Mrs. Kolbe does not indicate how the evidence preponderates against the trial court's finding, see Tenn.R.App.P. 13(d), and since we find the award appropriate and equitable under the circumstances, we affirm the attorney's fees award. We also note that there is nothing in the record indicating that Mrs. Kolbe requested an opportunity to cross-examine Mr. Allen or his counsel with respect the requested fees. *See Fain v. Fain*, M1999-02261-COA-R3-CV, 2000 WL 1879548, at *6 (Tenn.Ct.App. Dec. 29, 2000).

IV. PERSONAL PROPERTY DAMAGES

At the hearing, Mrs. Kolbe claimed that Mr. Allen failed to relinquish property that was due Mrs. Kolbe as part of the property division in the divorce settlement² and that Mr. Allen allowed some of the relinquished property to be damaged.³ “It is well settled that a former spouse's actions that reduce or destroy the value of property awarded to the other spouse in a divorce can result in alteration of the property division or in the award of damages to the spouse who is deprived of the property or its value.” *Edenfield v. Edenfield*, No. E2004-00929-COA-R3-CV, 2005 WL 2860289, at *10 (Tenn.Ct.App. Oct. 31, 2005) (citations omitted).

The trial court's finding that there was insufficient evidence to award Mrs. Kolbe damages for the alleged injury to her personal property was clearly based on the court's assessment of the parties' credibility. A trial court's determination regarding the credibility of the witnesses will not be reversed absent clear and convincing evidence to the contrary. *Stinson v. Stinson*, 161 S.W.3d 438, 440 (Tenn.Ct.App.2004). From a careful review of the all the evidence, we cannot conclude that the evidence preponderates against the trial court's decision not to credit Mrs. Kolbe for the claimed value of her damaged or missing property.

V. CONCLUSION

For the aforementioned reasons, the judgment of the trial court is affirmed in all respects. Mr. Allen requests an award of attorney's fees incurred in this appeal. Exercising our discretion, we decline this request. The costs of appeal are assessed against Mrs. Kolbe.

WILLIAM B. CAIN, JUDGE

² The property which Mrs. Kolbe alleged Mr. Allen failed to relinquish included two guns, an antique stereo, two cribs, a mini-pool table, and a stuffed animal. Mr. Allen admitted he had not returned the guns but only because the guns were registered in his name and Mrs. Kolbe had not yet signed the release. Mr. Allen also admitted to selling the antique stereo in order to support the children. Mr. Allen believed that he had returned the cribs and mini-pool table but he could not recall the whereabouts of the stuffed animal.

³ According to Mrs. Kolbe, Mr. Allen stored her property in a leaky garage and then placed the items by the muddy driveway for her to pick-up. The relinquished items included a couch, two oil paintings, and some collectable toy cars. Mr. Allen denied that the items were damaged while in his possession.